87 527

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROMEO V. CENTENO and BRUCE A. COANE,
Petitioners

v.

GEORGE P. SHULTZ, EDWIN MEESE, ALAN C. NELSON,
and LYNN W. CURTAIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRUCE A. COANE *
COANE AND ASSOCIATES
1900 West Loop South
Suite 820
Houston, Texas 77027
(713) 850-0066

PETER D. WILLIAMSON
WILLIAMSON, GARDNER, HALL
& WIESENTHAL
333 Clay Street
Suite 3800
Houston, Texas 77002
(713) 751-0222
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether, under the First Amendment, a United States citizen has a right to challenge in federal court the denial of a visitor visa for an alien member of his family.

2. Whether a federal court ever has subject matter jurisdiction to review the denial of a visa, where such visa was denied under 8 U.S.C. § 1184(b).

PARTIES TO THE PROCEEDING

The Petitioners are Romeo V. Centeno, an alien seeking a visitor visa to the United States, and Bruce A. Coane, a U.S. citizen and the brother-in-law of Romeo V. Centeno, who invited him to vist the United States.

The Respondents are George P. Shultz, Secretary of State of the United States; Edwin Meese, Attorney General of the United States; Alan C. Nelson, Commissioner of the United States Immigration and Naturalization Service; and Lynn W. Curtain, a United States consular officer posted at Manila, Philippines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

ROMEO V. CENTENO and BRUCE A. COANE,
Petitioners

v.

GEORGE P. SHULTZ, EDWIN MEESE, ALAN C. NELSON, and LYNN W. CURTAIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Romeo V. Centeno and Bruce A. Coane respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 1, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 817 F.2d 1212, and is reprinted in the appendix hereto, p. 1a, *infra.*

The decision of the United States District Court for the Southern District of Texas, Houston Division (Black, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 5a, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1987. On July 17, 1987, the court denied Petitioners' petition for rehearing, reprinted in the appendix hereto, p. 4a, *infra.* The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. *Administrative Procedure Act.*

5 U.S.C. § 706(2) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. *Immigration and Nationality Act.*

Section 101(a)(15)(B) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(15)(B), provides in pertinent part:

> As used in this Act—The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—an alien * * * having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.

Section 212(a)(27) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(27), provides:

> Except as otherwise provided by this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * * Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.

Section 212(d)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(d)(3), provides in pertinent part:

> Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) (other than paragraphs (27), (29), and (33)), may, after approval by the Attorney General of a recommenda-

> tion by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa * * *.

Section 214(b) of the Immigration and Nationality Act, 8 U.S.C. § 1184(b), provides in pertinent part:

> Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15).

Section 279 of the Immigration and Nationality Act, 8 U.S.C. § 1329, provides in pertinent part:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title.

3. 28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

4. *Constitution of the United States.*

Amendment I provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner, Romeo V. Centeno, is a native and citizen of the Philippines. He has never been to the United States. Petitioner, Bruce A. Coane, is a native and citizen of the United States. Petitioner Centeno ("Centeno") is the brother-in-law of Petitioner Coane ("Coane"), as

Coane is married to Centeno's sister. See p. 2a, *infra*. Coane invited Centeno to visit him and his family in Houston, Texas.

On or about April 1, 1986, Centeno applied for a visitor's visa to the United States. The visa application was denied by a consular official at the United States Embassy in Manila. See p. 2a, *infra*. Centeno was told by the consular officer that the visa was denied "because you do not speak good enough English."

After numerous communications with the United States Embassy in Manila, Coane was still unable to convince the consular officers to issue a visitor's visa to Centeno. Acting on behalf of himself and Centeno, Coane filed a complaint against the Respondents in the United States District Court on July 17, 1986. The complaint alleged that the denial of Centeno's visa application was improper and was not authorized by the Immigration and Nationality Act, constituted arbitrary and capricious action, and violated Coane's First Amendment rights. The Petitioners' complaint was dismissed by the district court on January 23, 1987. See p. 7a, *infra*.

In the district court, the judge based his entire three-page order on this Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). See p. 5a, *infra*. The judge made three significant findings. First, he held that the consular officials asserted numerous facially legitimate and bona fide reasons for the decision to deny Centeno a visa. The judge also held, citing *Kleindienst*, that he would not balance Coane's First Amendment interests against Respondent's reasons for denial. Finally, the judge noted, but refused to follow conflicting authority from the United States District Court in Massachusetts and the Court of Appeals for the District of Columbia. See p. 6a, *infra*.

Petitioners appealed the dismissal to the United States Court of Appeals for the Fifth Circuit. The per curiam

decision of the court of appeals is reported at 817 F.2d 1212. Although the court affirmed the district court's decision, it implicitly disagreed with the district court's finding of facially legitimate and bona fide reasons, stating that the denial of a visa under 8 U.S.C. § 1184(b) is not subject to any review by a federal court. See p. 2, 3a, *infra*. It stated that review was only proper if a statute provides for a waiver of exclusion. See p. 2a, *infra*. Finally, the court of appeals noted Coane's First Amendment rights issue (p. 2a, *infra*), but refused to discuss it in its opinion.

A Petition For Rehearing was timely filed with the court of appeals, and was denied on July 17, 1987.

REASONS FOR GRANTING THE PETITION

I. The Decision Below That Refuses to Address the First Amendment Issue, Raises Important and Unresolved Problems

This petition presents the question of, what credence a federal court should give, if any, to the First Amendment right of association, when such right is the basis for challenging the denial of a visa by a U.S. consular officer. The district court refused to balance the alleged reasons given for the denial of the visa against Coane's First Amendment rights. Likewise, the Fifth Circuit Court of Appeals affirmed the district court's order of dismissal without considering the constitutional rights of Coane.

The First Amendment's freedom of association is supported by this Court's decision in *Griswold v. State of Connecticut*, 381 U.S. 479 (1965). *Griswold* makes the freedom to associate a peripheral First Amendment right; a right that falls within the penumbra of the First Amendment. *Griswold*, 381 U.S. at 483. This court explained that ". . . while it [freedom of association] is not expressly included in the First Amendment, its ex-

istence is necessary in making the express guaranties fully meaningful." *Griswold supra.* Similarly, this Court stated that "[w]hile the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James,* 408 U.S. 169, 182 (1972). And in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), this court stated that its ". . . decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood,* 431 U.S. at 234.

More pertinent to this petition is the right of association in a family context. In *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 at 503, 504 (1977), this court reflected on the family by stating that, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, morals and culture." Building on *Moore,* this court in *Roberts v. United States Jaycees,* 468 U.S. 609 at 618, 619 (1984), noted that ". . . certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." The Court continued, saying that, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. *Id.*

The relationship between Co[illegible] and Centeno, contains all the attributes which distinguish their relationship as one protected by the constitution. Accordingly, their familial associational rights should be protected with the vigor that all constitutional rights are protected. And, with respect to the protection of constitutional rights, this Court has held that the freedom of association is ". . . protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference." *Healy*, 408 U.S. at 183, quoting *Bates v. City of Little Rock*, 361 U.S. 516 (1960). This Court has also held that ". . . a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. For even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper v. Pontikes*, 414 U.S. 51 at 58, 59 (1973).

The power of Congress is also limited when fundamental rights of U.S. citizens are involved. In *Fiallo v. Bell*, 430 U.S. 787, 793, n. 5 (1977), this Court commented that its cases reflect acceptance of a limited judicial responsibility under the constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ." The District Court for the District of Columbia has written that ". . . courts have frequently exercised subject matter jurisdiction where it was alleged that First Amendment violations had occurred in the administration of the Immigration act [citations omitted] and they have likewise found jurisdiction where a citizen claimed misapplication of the Act with respect to an alien with whom he had some relationship." *Abourezk v. Reagan*, 592 F. Supp. 880, 883, n. 10 (D.C.D.C. 1984) (vacated and remanded on other grounds), 785 F.2d 1043 (D.C. Cir. 1986), (cert. granted), 107 S.Ct. 666, 93 L.Ed.2d 718 (Dec. 15, 1986). Another District Court, in Massachusetts, has interpreted *Kleindienst, supra*, saying that ". . . the

Court in [*Kleindienst v.*] *Mandel* explicitly recognized that First Amendment rights are implicated in the Government's refusal to grant a visa to an alien with whom American citizens wish to speak." *Allende v. Shultz*, 605 F. Supp. 1220, 1223 (D. Mass. 1985). After citing to *Fiallo v. Bell, supra*, the court stated that the exercise of judicial review, though necessarily limited in scope, is particularly appropriate in cases like the one at bar which involve fundamental rights of United States citizens." *Allende* at 1223 citing *Kleindienst v. Mandel, supra* and *Abourezk v. Reagan, supra.*

The District of Columbia Circuit interpreted *Kleindienst, supra*, to mean that when constitutional rights of American citizens are implicated, government may be required to show facially legitimate and bonafide reasons for refusal of a visa. *Castaneda-Gonzalez v. I.N.S.*, 564 F.2d 417, 428, n. 25 (D.C. Cir. 1977). The Fifth Circuit, in this case, held that denial of visas to aliens is not subject to review, and it gave no credence at all to the First Amendment rights of Petitioner Coane.

The District of Columbia Circuit and the Fifth Circuit views of *Kleindienst* are in clear conflict. Judicial review is especially appropriate in this case because of the sham of an excuse given by the U.S. Consul, for denying the visa. The Government has no compelling interest in denying a visitor visa because the applicant's English is not good enough. They do not even have a legitimate interest as evidenced by the many applicants for visas that speak no English and are given visitor visas. Considering the importance of family ties and the freedom to associate with family members which is protected by the constitution, this petition should be granted, not only to clarify the *Kleindienst v. Mandel, supra*, inconsistencies between the District of Columbia Circuit and the Fifth Circuit, but also so that a clear statement can be made as to the consideration of First Amendment rights in connection with denied visa applications.

II. There Is a Direct Conflict Among the Courts of Appeal Concerning the Question of Subject Matter Jurisdiction

This case presents an important and recurring question of immigration law concerning the rights of U.S. citizens who invite foreign resident aliens to visit them. The Fifth Circuit, in its opinion, has misinterpreted *Kleindienst, supra*, to mean that the denial of a visa is never subject to review by a federal court unless the reason for exclusion can be waived by statute. See p. 2a, *infra*. The Fifth Circuit has created a distinction between visa waiver cases and visa cases where no waiver is available. This distinction has never before been made by any court. Such a distinction is not supported by the citations of the Fifth Circuit in its opinion, and it clearly conflicts with cases in other circuits that have reviewed visa denials by consular officers,[1] even in cases where no waiver was available. See, e.g., *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986);[2] *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985).[3]

In *Kleindienst*, 408 U.S. at 770, this Court held, "[W]hen the Executive exercises this power [of exclusion] negatively on the basis of a facially legitimate and bona fide reason, the courts "will not look behind the exercise of that discretion. . . ." This holding implicitly requires the Executive to give a facially legitimate and

---

[1] *Abourezk v. Reagan, supra* (action challenging refusal of Secretary of State to issue visas to aliens who plaintiff U.S. citizens and residents had invited); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525 (D. Mass. 1986) (action seeking to enjoin Secretary of State from refusing a permit to travel to an individual invited to speak by the U.S. citizens).

[2] In *Wong, supra*, the court held that review of the consular officer's decision to revoke a nonimmigrant visa was permitted under the APA.

[3] In *Allende, supra*, the district court refused to dismiss the case, even though review was sought concerning a denial under 8 U.S.C. § 1182(a)(27), where no waiver is available.

bona fide reason whenever a visa is denied, and allows a federal court to in fact determine if a given reason is facially legitimate and bona fide.

The conflict between the circuits is evidenced by the district judge below, who said, "Bound as this Court is to follow the Supreme Court's clear mandate, the Court is not persuaded by Plaintiff's authority from the Massachusetts District Courts and the Court of Appeals for the District of Columbia Circuit." See p. 6a, *infra*.[4] The district judge (and the Fifth Circuit), however, have failed to fully comprehend the "mandate" of *Kleindienst*. This Court and other circuit courts have held that through the broad grant of jurisdiction in 8 U.S.C. § 1329, there is no clear and convincing evidence of a congressional intent to preclude judicial review. *Abourezk*, 785 F.2d at 1050 citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) and *Karmali v. Immigration and Naturalization Service*, 707 F.2d 408, 409-410 (9th Cir. 1983). Furthermore, the Administrative Procedure Act, at 5 U.S.C. § 706(2) (1982), as explained by the Supreme Court in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 151, 152 (1970), authorizes suit by persons who suffer "injury in fact" by reason of the challenged agency action and are "arguably within the zone of interests to be protected or regulated" under a relevant statute. *See, Abourezk* at 1050. In *Abourezk*, at 1050, 1051 the court found that the plaintiffs were "aggrieved" by the State Department's resort to section 1182(a)(27) to keep out people they have invited to engage in open discourse with, within the United States.

---

[4] See, e.g. *Abourezk*, 785 F.2d at 1050, where the court of appeals held that the district court had subject matter jurisdiction under both its general federal question jurisdiction (28 U.S.C. § 1331) and its specific jurisdiction over claims arising under the Immigration and Nationality Act (8 U.S.C. § 1329).

The conflict in the courts of appeal and district courts over the subject matter jurisdiction question will result in the disparate treatment of aliens and their United States sponsors. Such a significant decision as to whether the United States citizens can meet with family or others should not depend on the happenstance of the circuit in which they seek review.

III. The Decision Below Is Erroneous

The court of appeals has incorrectly cited *Te Kuei Lui v. Immigration and Naturalization Service*, 645 F.2d 279, 285 (5th Cir. 1981) and *Gonzalez-Cuevas v. Immigration and Naturalization Service*, 515 F.2d 1222, 1224 (5th Cir. 1975), because it has overlooked the fact that neither case challenged the decision of a consular officer in federal court. Both cases have said, in the second to last paragraph of their respective opinions, that, the action is not within the ambit of the court's review. *Gonzalez-Cuevas* at 1224 and *Te Kuei Liu* at 285. In both of those cases, the court stated that the issue of a consular decision was not properly before the court.

Both *Te Kuei Liu* and *Gonzalez-Cuevas* were before the court of appeals on petitions for review from administrative decisions. Neither case was ever in federal district court, and neither case was brought against the Department of State or a consular officer. Both cases on appeal tangentially raised arguments about consular officers, but since that issue cannot be brought before the court on a petition for review, the court properly refused to consider the issue. See, e.g., *Te Kuei Liu* at 282. In citing *Te Kuei Liu* and *Gonzalez-Cuevas*, the court of appeals has overlooked the fact that neither case had issues of consular reviewability properly before the court, and in fact, neither case reached a holding on this issue. As such, the court's statement in the case at bar, "This result is in accord with our prior holdings that decisions of United States consuls on visa matters are nonreviewable by the courts," (p. 3a, *infra*) is a misapprehension of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE A. COANE *
COANE AND ASSOCIATES
1900 West Loop South
Suite 820
Houston, Texas 77027
(713) 850-0066

PETER D. WILLIAMSON
WILLIAMSON, GARDNER, HALL
& WIESENTHAL
333 Clay Street
Suite 3800
Houston, Texas 77002
(713) 751-0222
Attorneys for Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2133

Summary Calendar

ROMEO V. CENTENO and BRUCE A. COANE,
Plaintiffs-Appellants,

v.

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants-Appellees.

June 1, 1987

Appeal from the United States District Court
for the Southern District of Texas

Before GEE, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

Romeo Centeno and Bruce Coane appeal from the district court's dismissal of their lawsuit against the appellees. Because we find that the consular officer's decision to deny Centeno a visa to enter this country was not reviewable by a federal court, we affirm the dismissal of the appellants' lawsuit.

Romeo Centeno, a citizen of the Philippines, applied for a visitor's visa to the United States on or around April 1, 1986. This application was denied by a consular official at the Untied States Embassy in Manila. Despite further efforts on behalf of Centeno by his brother-in-law, Bruce Coane, a United States citizen, no visa for Centeno was obtained. Acting on behalf of himself and Centeno, Coane filed a complaint against the appellees in United States District Court on July 17, 1986. The complaint alleged that the denial of Centeno's visa application was not authorized by the Immigration and Nationality Act, constituted arbitrary and capricious action, and violated Coane's first amendment rights. The appellants' complaint was dismissed by the district court on January 23, 1987.

Under *Kliendienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), the denial of visas to aliens is not subject to review by the federal courts. 408 U.S. at 766, 92 S.Ct. at 2583. Where the statute under which the alien is excluded provides for a waiver of exclusion, the denial of the waiver is subject to only a minimal review by federal courts. *Id.* at 770, 92 S.Ct. at 2585. Such review is limited solely to the determination of whether a facially legitimate and bona fide reason exists for the denial of the waiver. *Id.* Since Centeno was denied a visa under 8 U.S.C. § 1184(b),[1] which does

---

[1] 8 U.S.C. § 1184(b) provides:

> Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act, or an alien who is the attendant, servant, employee, or member of the immediate family of such alien shall not be entitled to apply for or receive an

not provide for waiver, however, the denial of his visa is not subject to any review by a federal court.

This result is in accord with our prior holdings that decisions of United States consuls on visa matters are nonreviewable by the courts. *Te Kuei Liu v. INS*, 645 F.2d 279, 285 (5th Cir.1981); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir.1975). The district court's dismissal of the appellant's suit is therefore

AFFIRMED.

---

immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

Centeno applied for a nonimmigrant visitor's visa.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2133

ROMEO V. CENTENO and BRUCE A. COANE,
Plaintiffs-Appellants,

versus

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(Filed July 17, 1987)

Before GEE, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Jolly
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-2737

ROMEO V. CENTENO, *et al.*,
Plaintiffs

vs.

GEORGE P. SHULTZ, *et al.*,
Defendants.

[Filed Jan. 23, 1987]

ORDER

Plaintiffs herein are an American citizen and a citizen of the Philippines. They ask this Court for declaratory and injunctive relief from a decision by United States consular authorities in the Philippines, who denied Plaintiff Centeno a visitor's visa to enter the United States. Defendants, various officers of the United States government's executive branch, have filed a motion to dismiss. They argue that this Court lacks jurisdiction to review such a decision, citing the case of *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

In *Kleindienst*, the Supreme Court refused to overturn a State Department decision to deny a temporary visa to a Belgian citizen who had described himself as "a revolutionary Marxist." *Id.* at 756. The action was filed by the Belgian citizen and some American citizens, who argued that the State Department's decision infringed upon their first amendment rights to receive information. It is unclear from the Court's language whether

its decision was based on jurisdictional grounds as argued by Defendants herein, but the holding of *Kleindienst* is quite clear:

> (W)hen the Executive exercises (its plenary power to exclude aliens) negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770.

In the present case, the exhibits attached to Plaintiff's complaint indicate that the appropriate officials asserted numerous facially legitimate and bona fide reasons for the decision to deny this visa application. This Court will follow the Supreme Court's mandate from *Kleindienst*, and will not look behind those reasons nor balance them against Plaintiff Coane's claimed first amendment interests. Bound as this Court is to follow the Supreme Court's clear mandate, the Court is not persuaded by Plaintiff's authority from the Massachusetts District Courts and the Court of Appeals for the District of Columbia Circuit. Therefore, it is

ORDERED that Defendants' motion to dismiss is GRANTED. This makes MOOT Defendants' motion for summary judgment and Plaintiffs' motion to strike. It is further

ORDERED that Plaintiffs' motion to reconsider protective order and motion for sanctions are DENIED.

IT IS SO ORDERED.

Done at Houston, Texas, this 23rd day of January, 1987.

/s/ Norman W. Black
NORMAN W. BLACK
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-2737

ROMEO V. CENTENO, *et al.*,
Plaintiffs

vs.

GEORGE P. SHULTZ, *et al.*,
Defendants.

[Filed Jan. 23, 1987]

FINAL JUDGMENT

This Court having granted Defendants' motion to dismiss, this case is DISMISSED with prejudice.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 23rd day of January, 1987.

/s/ Norman W. Black
NORMAN W. BLACK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-2737

ROMEO V. CENTENO, *et. al.*,
Plaintiffs,

v.

GEORGE P. SHULTZ, *et. al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that ROMEO V. CENTENO, and BRUCE A. COANE, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit, from the Order and Final Judgment granting Defendants' Motion to Dismiss and dismissing this case with prejudice, respectively both entered in this action on the 23rd day of January, 1987.

Respectfully submitted,
COANE AND ASSOCIATES

By: /s/ Bruce A. Coane
BRUCE A. COANE
3D/International Tower
1900 W. Loop S., Suite 820
Houston, Texas 77027
(713) 850-0066
Attorneys For Plaintiffs

No. 87-527 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROMEO V. CENTENO AND BRUCE A. COANE, PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-527

ROMEO V. CENTENO AND BRUCE A. COANE, PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred when it held that their First Amendment right of association did not entitle them to judicial review of a consular officer's decision denying petitioner Centeno a nonimmigrant visa to enter the United States. They also assert that the court of appeals' decision is in conflict with various lower federal court decisions.

1. Petitioners Centeno and Coane are citizens of the Philippines and the United States, respectively, and are brothers-in-law, through Coane's marriage to Centeno's sister. On April 1, 1986, Centeno applied for a nonimmigrant visa to visit the United States. A consular officer at the United States Embassy in Manila denied the application. Pet. App. 2a.

When Coane later inquired why the visa had been denied, a consul at the Embassy advised Coane that Centeno had failed to qualify under Section 214(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1184(b). The consul explained that under Section 214(b) applicants bear a burden to prove "that they have

residences abroad they have no intention of abandoning and that they seek to enter the United States temporarily." The consul stated that Centeno had not carried that burden of proof, noting that "he was not currently in school or employed; that he had no family ties strong enough to compel his return after visiting the United States; and that Mr. Centeno had never travelled outside of the Philippines." The consul observed that Centeno's ineligibility was "not permanent and may be overcome by submission of additional evidence." She invited Centeno "to reapply at anytime." Pet. App. 2a; C.A. App. 133-134.

2. Petitioners thereafter filed a complaint alleging that the denial of the visa to Centeno was unlawful, in part because it violated Coane's First Amendment right to associate with his brother-in-law (Pet. App. 2a). The district court dismissed the complaint (*id.* at 5a-7a). It noted (*id.* at 6a) that "the exhibits attached to [petitioners'] complaint indicate that the appropriate officials asserted numerous facially legitimate and bona fide reasons for the decision to deny this visa application." Relying on this Court's decision in *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), the district court concluded (Pet. App. 6a) that it would "not look behind th[e] [officials'] reasons nor balance them against * * * Coane's claimed first amendment interests."

3. The court of appeals unanimously affirmed (Pet. App. 1a-3a), holding that the consul's denial of a visa to Centeno was not subject to review by a federal court. It reasoned (*id.* at 2a) that "[w]here the statute under which the alien is excluded provides for a waiver of exclusion, the denial of the waiver is subject to only a minimal review by federal courts"—specifically, a review "limited solely to the determination of whether a facially legitimate and bona fide reason exists for the denial of the waiver." The court explained, however, that Centeno had been denied a

visa under 8 U.S.C. 1184(b), "which does not provide for a waiver" (Pet. App. 2a-3a). Accordingly, it held, the visa denial was not subject to judicial review.

4. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. IV) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking temporary admission into the United States for one or more of the purposes specified in 8 U.S.C. (& Supp. IV) 1101(a)(15). Pursuant to 8 U.S.C. 1184(b), however, "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, * * * that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title." The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]" (8 U.S.C. 1361).[1]

b. The authority to grant or deny nonimmigrant visas is assigned to consular officers (8 U.S.C. (& Supp. IV) 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)). In the present case, a consular officer in Manila

---

[1] Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

determined that petitioner Centeno had not overcome the presumption under 8 U.S.C. 1184(b) that he was an intending immigrant and concluded accordingly that Centeno was not entitled to a visitor's visa to come to the United States.

The court of appeals correctly held that the consul's decision was nonreviewable, even in the face of a putative First Amendment claim.[2] "[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review" (*Li Hing of Hong Kong, Inc.* v. *Levin,* 800 F.2d 970, 971 (9th Cir. 1986)). Accord *Ventura-Escamilla* v. *INS,* 647 F.2d 28, 30-31 (9th Cir. 1981); *Wan Shih Hsieh* v. *Kiley,* 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Castaneda-Gonzalez* v. *INS,* 564 F.2d 417, 428 n.25 (D.C. Cir. 1977); *Rivera de Gomez* v. *Kissinger,* 534 F.2d 518, 519 (2d Cir.), cert. denied, 429 U.S. 897 (1976). As the Ninth Circuit explained in the *Li Hing* case (800 F.2d at 970), "[t]he doctrine of nonreviewability of a consul's decision to grant or deny a visa stems from the Supreme Court's confirming that the legislative power of Congress over the admission of aliens is virtually complete." See also *Lem Moon Sing* v. *United States,* 158 U.S. 538, 547 (1895).

c. Petitioners do not dispute "the doctrine of nonreviewability of a Consul's decision to grant or deny a visa" (*Ventura-Escamilla* v. *INS,* 647 F.2d at 30), and they do not deny that the court of appeals applied that doctrine in the present case. They contend, however, that this Court's decision in *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), has relaxed that doctrine. As petitioners put it

---

[2] Petitioner Centeno personally, "as an unadmitted and nonresident alien, ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972). Accord *Galvan* v. *Press,* 347 U.S. 522, 530-532 (1954); *United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 292 (1904).

(Pet. 10-11), the *Kleindienst* case "requires the Executive to give a facially legitimate and bona fide reason whenever a visa is denied, and allows a federal court to in fact determine if a given reason is facially legitimate and bona fide." That contention is meritless for two reasons.

First, the *Kleindienst* case casts no doubt on the general proposition that a consul's denial of a visa is nonreviewable. In *Kleindienst* the plaintiffs challenged a decision by the Attorney General not to grant a waiver of ineligibility to Ernest Mandel, a self-described "revolutionary Marxist." Mandel had been found to be ineligible to receive a visa under Section 212(a)(28)(D) of the Immigration Act, 8 U.S.C. 1182(a)(28)(D), because of his Marxist beliefs. Under Section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3), however, that ineligibility can be waived by the Attorney General, upon a recommendation by the Secretary of State or a consular officer, thus permitting the alien to enter the United States temporarily. Mandel had been invited to address various academic groups, and plaintiffs asserted a First Amendment right to hear his views. Although this Court agreed that "First Amendment rights [were] implicated" (408 U.S. at 765), it rejected plaintiffs' claim. The Court did not, however, reach the question whether the "First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced" (*id.* at 770). Instead, the Court found a narrower ground on which to reject plaintiffs' claim: because the Attorney General had refused to waive the ineligibility "on the basis of a facially legitimate and bona fide reason," the Court refused to "look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant" (*ibid.*). Having expressly declined to reach the broader issue of complete nonreviewability, however, the *Kleindienst* case plainly does not

contradict the settled principle "that the judiciary will not interfere with the visa-issuing process" (*Wan Shih Hsieh* v. *Kiley*, 569 F.2d at 1181).[3]

But even if the *Kleindienst* case requires the government to present facially legitimate grounds for its denial of a visa, the government clearly carried that modest burden in this case. As the district court concluded, and as petitioners make no effort to dispute, the consul in Manila denied Centeno a visa because he had failed to overcome the presumption of immigrant status under 8 U.S.C. 1184(b). The consul noted (see C.A. App. 133-134) that because of his lack of (1) employment, (2) significant family ties, and (3) prior travel experience, Centeno's visa application simply did not warrant a finding that he would

---

[3] None of the court of appeals' decisions on which petitioners rely contradict the nonreviewability principle. Indeed, the District of Columbia Circuit in *Castaneda-Gonzalez* v. *INS*, 564 F.2d 417 (1977), recognized that a consular officer could exclude an alien under a particular section of the Immigration Act "without fear of reversal since visa decisions are nonreviewable" (564 F.2d at 428 n.25). To be sure, that court noted in dicta (*ibid.*) that under the *Kleindienst* case "when constitutional rights of American citizens are implicated, [the] government may be required to show [a] 'facially legitimate and bona fide reason' for refusal of visa." But the court did not embrace that broad reading of *Kleindienst* in its disposition of the merits. Similarly, while the court of appeals in *Wong* v. *Department of State*, 789 F.2d 1380 (9th Cir. 1986), did agree to review a consular official's *revocation* of a visa, the Ninth Circuit made clear more recently in the *Li Hing* case that *Wong* does not authorize judicial review of a consul's decision to grant or deny a visa. See 800 F.2d at 971. And the District of Columbia Circuit did not expressly address the question of consular nonreviewability in its decision in *Abourezk* v. *Reagan*, 785 F.2d 1043 (1986), aff'd by an equally divided Court, No. 86-656 (Oct. 19, 1987); that case turned instead on the construction of the Immigration Act. See 785 F.2d at 1051 n.6.

"return after visiting the United States."[4] Those reasons were plainly sufficient to justify the denial of the visa.[5]

d. In any event, this case is an inappropriate vehicle for departing from the principle of nonreviewability of consular visa denials. Petitioners assert a generalized First Amendment right to association that purportedly entitles them to second-guess the judgment of the consul in Manila. A like claim can no doubt be made in the vast number of visa applications involving family members overseas. But as the Court explained in the *Kleindienst* case (408 U.S. at 768-769), involving the Attorney General's waiver authority, such a "First Amendment argument would prove too much":

> Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien * * *, one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.

---

[4] Petitioners point to nothing in the record to support their assertion (Pet. 5, 9) that Centeno was denied a visa based on his inability to speak English.

[5] Because the Consul provided facially legitimate reasons for the denial of the visa, petitioners' reliance on the district court decisions in *Harvard Law School Forum* v. *Shultz*, 633 F. Supp. 525 (D. Mass. 1986), vacated as moot, No. 86-1371 (1st Cir. June 18, 1986), and *Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985), is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1987

☆ U.S. GOVERNMENT PRINTING OFFICE 1987—202-037/60143